

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NORMAN KEITH CABLE,

Appellant.

No. 37941-4-II

Consolidated with

37951-1-II

UNPUBLISHED OPINION

Hunt, J. – Norman Keith Cable appeals his jury convictions for two felony violations of a domestic violence no-contact order. He argues that the trial court’s failure to instruct the jury that the State had to prove all elements of the charged felonies beyond a reasonable doubt violated his right to due process. Conceding this error, the State asserts, and Cable agrees, that the evidence was nevertheless sufficient to support convictions for lesser gross misdemeanor violations of a no-contact order. Accepting the State’s concession and the parties’ proposal for remand, we vacate Cable’s two felony convictions and remand to the trial court for entry of convictions on two counts of gross misdemeanor violations of a no-contact order and for resentencing.

FACTS

Wanda Chesterman had a no-contact order against her son Norman Keith Cable. On April 6, 2007, Cable visited Chesterman, who called the police. In January 2008, the police arrested Cable again for violating the no-contact order.

I. Charges

The State charged Cable with two counts of felony domestic violence violation of a Clark County no-contact order under cause number 07-1-00684-2; the State elevated these two charges to felonies based on Cable's two prior no-contact order convictions, one in Clark County and one in King County. The trial court consolidated this case with a second case, in which the State charged Cable with one count of felony domestic violence violation of a Skamania County¹ no-contact order, cause number 08-1-00049-4; the State similarly elevated this charge to a felony based on two prior no-contact order convictions, one in King County and one in Skamania County.

These consolidated cases went to a jury trial. After resting, the trial court granted Cable's motion to dismiss count two in the first case, cause number 07-1-00684-2, for insufficient evidence.

Cable also moved to dismiss the charge in the second case, cause number 08-1-00049-4, arguing that the State had presented no proof that he had a prior conviction for violating a Skamania County no-contact order because no such conviction existed. The State moved to amend the information to correct the names of the counties in which Cable had been previously convicted of no-contact order violations. Over Cable's objection, the trial court granted the State's motion and allowed the State to amend the information in cause number 08-1-00049-4, to list his previous misdemeanor no-contact order convictions in Clark County and King County as

¹ The State later amended this information to change the charge to violation of a Clark County no-contact order.

elevating his crime to a felony.

At this point, there remained for the jury's consideration two counts of felony domestic violence court order violation, one in each cause number.

II. Jury Instructions, Verdicts, and Sentence

Although the State had charged Cable with *felony* violations of a domestic violence no-contact order based on the existence of two prior violations, the trial court instructed the jury on the elements necessary "to convict" Cable of a *misdemeanor* violation of a domestic violence no-contact order.² And although the jury received special verdict forms, asking whether Cable had

² Instruction 7 provided:

To convict the defendant of the crime of violation of a no-contact order (Count 1, Cause No. 07-1-00684-2), each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 6th day of April, 2007, the defendant willfully had contact with Wanda Chesterman;
- (2) That such contact was prohibited by a no-contact order;
- (3) That the defendant knew of the existence of the no-contact order;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 19.

Instruction 8 provided:

To convict the defendant of the crime of violation of a no-contact order (Count 1, Cause No. 08-1-00049-4), each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 4th day of January, 2008, the defendant willfully came within the restricted distance of Wanda Chesterman's residence;
- (2) That such contact was prohibited by a no-contact order;
- (3) That the defendant knew of the existence of the no-contact order;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

two previous convictions for violating no-contact orders, the trial court did not instruct them that they could answer “yes” on the special verdict forms only if they decided unanimously that the State had proved Cable’s two previous no-contact order convictions beyond a reasonable doubt. Cable neither objected to these jury instructions nor proposed alternatives.

The jury returned guilty verdicts and answered “yes” to the questions about Cable’s prior convictions on both special verdict forms, thereby elevating the two no-contact order violations to felonies. The trial court gave Cable a Drug Offender Sentencing Alternative³ sentence, with 30 months confinement and 30 months community custody for each cause number, to run concurrently.

Cable appeals.⁴

analysis

I. Erroneous Instructions

Cable argues that the trial court’s failure to instruct the jury that the State had to prove all elements of the charged crimes beyond a reasonable doubt violated his right to due process. The State concedes this error.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999). . . . It is prejudicial error to submit an issue to the

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.
CP at 20.

³ RCW 9.94A.660.

⁴ Cable moved for accelerated review under RAP 18.12. We grant his motion.

jury that is not warranted by the evidence. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002). *See also State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005).

A “to convict” instruction must contain all elements of the charged crime because the instruction dictates how the jury measures the evidence to reach a verdict. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The State must prove every element of the charged offense beyond a reasonable doubt. *State v. Tongate*, 93 Wn.2d 751, 753, 613 P.2d 121 (1980) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Instructions that relieve the State of its burden to prove every element of the crime require automatic reversal. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). *See also State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995) (“The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. . . . It is reversible error to instruct the jury in a manner that would relieve the State of its burden.”).

Here, the trial court properly instructed the jury about the elements the State must prove beyond a reasonable doubt to establish a gross misdemeanor violation of a no-contact order; and the instructions properly defined only a gross misdemeanor no-contact order violation. CP at 18-20. But the trial court did not similarly give the jury a “to convict” instruction enumerating the elements the State must prove beyond a reasonable doubt to establish a felony no-contact order violation, even though the State had charged the two crimes as felonies. Failure to give such instruction is reversible error. *Brown*, 147 Wn.2d at 339.

Nor did the jury receive instruction about how to consider Cable's previous convictions. More specifically, the trial court did not instruct the jury that it could answer "yes" on the special verdict forms only if it unanimously agreed that the State had proved Cable's prior no-contact order violation convictions beyond a reasonable doubt. Failure to give such instruction is also reversible error. *See Brown*, 147 Wn.2d at 339. Accepting the State's concession of error, we reverse both felony convictions.

II. Sufficient Evidence To Support Misdemeanor Convictions

Both parties ask us to remand to the trial court for entry of judgment on two counts of gross misdemeanor violations of a no-contact order. We agree with the State that sufficient evidence supports misdemeanor convictions for Cable's having violated a no-contact order in both cause numbers.

At trial, the State offered into evidence (1) the Clark County no-contact order prohibiting Cable from contacting Chesterman or entering her home and (2) the judgments and sentences for Cable's prior King County and Clark County convictions. The State's witnesses testified that Cable had entered Chesterman's home twice while the Clark County no-contact order remained in effect. Finally, although Cable testified that he believed the trial court had lifted the no-contact order, he also testified that he never appeared in court to have the order lifted and he had received no paperwork confirming that the order had been lifted. Thus, the State presented witness testimony and evidence that (1) a valid no-contact order prohibited Cable from entering Chesterman's home; (2) Cable entered his mother's home twice between 2007 and 2008; and (3) Cable knew about the no-contact order when he entered her home. This evidence is sufficient to

support two convictions for gross misdemeanor⁵ violations of the Clark County no-contact order under the counts charged in both cause numbers.

Accordingly, we accept the State's concession of error, vacate Cable's two felony convictions for domestic violence court order violation, and remand to the trial court for entry of convictions on two counts of gross misdemeanor violation of a no-contact order and for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.

⁵ RCW 26.50.110.